In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-680

EDMUND J. OLSEN,
Petitioner,

VS.

PEOPLE OF THE TERRITORY OF GUAM,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

The Petitioner, Edmund J. Olsen, respectfully prays that a writ of certiorari issue to review the amended judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on September 26, 1979.

OPINIONS BELOW

A copy of the *initial* opinion of the Ninth Circuit is unreported and is printed as Appendix A hereto. A copy of the Ninth Circuit's *amended* opinion, not yet reported, is printed as Appendix B hereto. Appendix C hereto is the opinion rendered by the District Court of Guam. The latter is reported at 462 F.Supp. 608.

JURISDICTION

The *initial* judgment of the Ninth Circuit was entered on August 2, 1979. On September 26, 1979, a timely petition for rehearing *en banc* was denied, but an *amended* judgment was entered. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Ninth Circuit has jurisdiction to entertain appeals by the government of Guam from the District Court of Guam in criminal cases.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

United States Code, Title 48:

§ 1424. District Court—Other courts—Jurisdiction

(a) There is hereby created a court of record to be designated the "District Court of Guam," and the judicial authority of Guam shall be vested in the District Court of Guam and in such court or courts as may have been or may hereafter be established by the laws of Guam. The District Court of Guam shall have the jurisdiction of a district court of the United States in all causes arising under the Constitution, treaties, and laws of the United States, regardless of the sum or value of the matter in controversy, shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it, and shall have such appellate jurisdiction as the legislature may determine. The jurisdiction of and the procedure in the courts of Guam other than the District Court of Guam shall be prescribed by the laws of Guam. Appeals to the District Court of Guam shall be heard and determined by an appellate division of the court consisting of three judges, of whom two shall constitute a quorum. The judge appointed for the court by the President shall be the presiding judge of the appellate division and shall preside therein unless disqualified or otherwise unable to act. The other judges who are to sit in the appellate division at any session shall be designated by the presiding judge from among the judges assigned to the court from time to time pursuant to section 24(a) of this Act. The concurrence of two judges shall be necessary to any decision by the District Court of Guam on the merits of an appeal but the presiding judge alone may make any appropriate orders with respect to an appeal prior to the hearing and determination thereof on the merits and may dismiss an appeal for want of jurisdiction or failure to take or prosecute it in accordance with the applicable law or rules of procedure.

(b) The rules heretofore or hereafter promulgated and made effective by the Supreme Court of the United States pursuant to section 2072 of title 28, United States Code, in civil cases; section 2073 of title 28, United States Code, in admiralty cases; sections 3771 and 3772 of title 18, United States Code, in criminal cases; and 2075 of title 28, United States Code, in cases

under title 11, United States Code, shall apply to the District Court of Guam and to appeals therefrom; except that no provisions of any such rules which authorize or require trial by jury or the prosecution of offenses by indictment by a grand jury instead of by information shall be applicable to the District Court of Guam unless and until made so applicable by laws enacted by the Legislature of Guam, and except further that the terms "attorney for the government" and "United States attorney," as used in the Federal Rules of Criminal Procedure, shall, when applicable to cases arising under the laws of Guam, mean the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein.

Penal Code of Guam:

§ 1238. In what cases by the government

An appeal may be taken by the government:

1. From an order setting aside the information;

2. From a judgment for the defendant on a demurrer to the accusation or information;

3. From an order granting a new trial;

4. From an order arresting judgment;

5. From an order made after judgment, affecting the substantial rights of the government.

STATEMENT OF THE CASE

Olsen was convicted of receiving stolen property, burglary, and assault with a deadly weapon in the Superior Court of Guam.[1] He appealed to the District Court of

[1]Judgment, Record at 46E-32.

Guam.[2] The jurisdiction of the district court was invoked under 48 U.S.C. § 1424. The district court dismissed Olsen's appeal.[3] The dismissal was on authority of *Agana Bay Dev. Co. (Hong Kong) Ltd. v. Supreme Court of Guam,* 529 F.2d 952 (9th Cir. 1976). That decision held "that the Territory of Guam is authorized to eliminate the appellate jurisdiction of the District Court of Guam, pertaining to local, non-federal issues, by transferring that jurisdiction to a court created by the territorial legislature."[4] Olsen appealed the dismissal to the Ninth Circuit.[5]

Meanwhile Olsen moved the superior court "for leave to appeal in forma pauperis and to provide him with a transcript of all proceedings."[6] The motion was granted, and it was ordered "that defendant be provided with a transcript of all proceedings."[7] The date of the superior court's order was March 29, 1976.

The Ninth Circuit overruled *Agana Bay* and reversed the district court's dismissal, holding "that the provisions of Guam's Court Reorganization Act transferring the appellate jurisdiction of the district court to a territorial court are not authorized by the Organic Act."[8] This Court affirmed.[9]

Back in the district court Olsen moved "to reverse the judgment of conviction with instructions to enter a judg-

[2]Notice of Appeal, Record at 46E-30.
[3]Order, Record at 2.
[4]529 F.2d at 953.
[5]Notice of Appeal, Record at 3.
[6]Motion to Appeal in Forma Pauperis, Etc., Record at 46E-34.
[7]Order, Record at 37.
[8]Guam v. Olsen, 540 F.2d 1011, 1012 (9th Cir. 1976).
[9]Guam v. Olsen, 431 U.S. 195 (1977).

ment of acquittal on the ground that not only has there been a failure to provide defendant-appellant with a transcript with reasonable promptness, but such failure has now gone on for over two years, a wholly unreasonable period of time."[10] The district court found "that the preparation of the instant transcript has been unreasonably delayed and no good cause or excuse for the delay has been shown"[11] and held that "we must opt for prompt appeals and we must take the step, unwelcome as it is, of turning loose a presumptively guilty Defendant, in order to vindicate the public policies involved."[12] The conviction was reversed and the cause remanded to the superior court "with instructions to enter a judgment of acquittal."[13] The government of Guam appealed.[14]

Olsen moved to dismiss the appeal for want of jurisdiction.[15] The motion was in large measure based upon *Virgin Islands v. Hamilton,* 475 F.2d 529 (3d Cir. 1973), a decision penned by the Honorable Albert Branson Maris, a Senior Circuit Judge described by this Court as "judicial advisor to Guam."[16] (*Hamilton* holds "that Section 1291 of title 28, U.S.C., does not give the Virgin Islands Government authority to appeal in criminal cases."[17]) The Ninth Circuit ordered the motion "referred to the panel which

[10]Motion, Record at 29.

[11]Guam v. Olsen, 462 F.Supp. 608, 610 (D. Guam 1978), printed as Appendix C hereto.

[12]*Id* at 613 (footnote omitted).

[13]*Id* at 614.

[14]Notice of Appeal, Record at 67.

[15]Motion to Dismiss (filed April 2, 1979).

[16]Guam v. Olsen, 431 U.S. 195, 197 at n. 2 (1977).

[17]Virgin Islands v. Hamilton, 475 F.2d 529, 531 (3rd Cir. 1973).

considers the case on the merits."[18] The district court's order was "REVERSED and REMANDED."[19] But Olsen's motion to dismiss the appeal had been overlooked.

This made it necessary for Olsen to petition for a rehearing. In his petition Olsen suggested that the rehearing be *en banc,* and he once again invited the Ninth Circuit's attention to *Hamilton.*[20]

The suggestion that the rehearing be *en banc* was rejected, and the petition for rehearing itself was denied, but the panel voted to amend its opinion.[21] The amended opinion held that "this case is entirely unlike *Virgin Islands v. Hamilton*" and, like the initial opinion, "REVERSED and REMANDED."[22]

The Ninth Circuit's mandate has been stayed until the final disposition of this petition.[23]

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts With The Decision Of Another Court Of Appeals On The Question Whether Courts Of Appeals Have Jurisdiction To Entertain Appeals By Territorial Governments From Territorial District Courts In Criminal Cases

The Ninth Circuit describes the course of the proceedings in the present case as follows:

[18]Order (filed May 22, 1979).

[19]Opinion, printed as Appendix A hereto.

[20]Petition for Rehearing (filed Aug. 13, 1979).

[21]Order (filed Sept. 26, 1979).

[22]Amended Opinion, printed as Appendix B hereto.

[23]Order Staying Issuance of Mandate (filed Oct. 1, 1979).

> The People of the Territory of Guam appeal from a decision of the District Court of Guam sitting as an appellate court, reversing a jury conviction in the Superior Court of Guam and remanding the case to the trial court with instructions to enter a judgment of acquittal.[24]

Virgin Islands v. Hamilton, 475 F.2d 529 (1973), came before the Third Circuit the same way:

> The Government of the Virgin Islands appeals from a judgment entered in the District Court of the Virgin Islands, 334 F.Supp. 1382, reversing the judgments of the Municipal Court of the Virgin Islands on which the defendant, William Hamilton, was convicted of three charges, namely, brandishing and exhibiting a deadly weapon, aggravated assault and battery, and possessing an unlicensed firearm, and sentenced to terms of imprisonment of one year on each of the first two charges and to 90 days on the third charge. The Government contends on this appeal that the district court, sitting as an appellate court on appeal from the municipal court, erred in holding that the evidence was insufficient to support the charges and erred in failing to remand the case to the municipal court for further proceedings to determine whether the defendant was guilty of the lesser offense of simple assault.[25]

Olsen's motion to dismiss in the Ninth Circuit reads as follows:

> Olsen respectfully moves the Court to dismiss this appeal, because this Court lacks jurisdiction to entertain it, all on the following grounds:

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[24]Amended Opinion, printed as Appendix B hereto.

[25]Virgin Islands v. Hamilton, 475 F.2d 529, 530 (3rd Cir. 1973) (footnote omitted).

1. "[C]ourt of appeals jurisdiction over district court decisions must . . . be granted by Congress." *Corn v. Guam Coral Co.,* 318 F.2d 622, 627 (9th Cir. 1963).

2. 28 U.S.C. § 1291 does not give the government of Guam authority to appeal in criminal cases. *Virgin Islands v. Hamilton,* 475 F.2d 529 (3rd Cir. 1973) (Maris, J.); accord, *Umbriaco v. United States,* 258 F.2d 625 (9th Cir. 1958); cf. *Guam v. Olsen,* 431 U.S. 195, 197 at n. 2 (1977) ("Judge Albert B. Maris, judicial adviser to Guam").

3. 18 U.S.C. § 3731, even if otherwise applicable, by its express terms applies not to an appeal by the government of Guam, but only to "an appeal by the United States."

There has been no previous application for the relief sought by this motion.[26]

The motion presented in *Hamilton* was essentially identical:

> In limine, the defendant has moved for dismissal of the appeal for lack of jurisdiction, urging that the Government of the Virgin Islands has no right to appeal from a decision of the district court adverse to it on the defendant's appeal from a criminal judgment in the municipal court.[27]

The Third Circuit begins its discussion:

> The existence of appellate jurisdiction in a specific federal court over a given type of case is dependent upon authority expressly conferred by statute. Carroll v. United States, 1957, 354 U.S. 394, 399, 77 S.Ct. 1332,

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[26]Motion to Dismiss (filed April 2, 1979).

[27]Virgin Islands v. Hamilton, 475 F.2d 529, 530 (3rd Cir. 1973).

1 L.Ed.2d 1442. In the case of this court, its statutory appellate jurisdiction over decisions of the District Court of the Virgin Islands is of "Appeals from reviewable decisions" of that court, 28 U.S.C. § 1294. The Virgin Islands Government argues that it is authorized to take this appeal under the provision of section 1291 of title 28, U.S.C., that the court of appeals shall have jurisdiction of "appeals from all final decisions of the . . . District Court of the Virgin Islands." The Government asserts that it has been aggrieved by a decision of that court which is unquestionably "final," and, therefore, is authorized by section 1291 to appeal from that decision to this court.

In considering the question which the Virgin Islands Government thus raises, we must keep in mind the well-settled rule that an appeal by the prosecution in a criminal case is not favored and must be based upon express statutory authority. Will v. United States, 1967, 389 U.S. 90, 96, 88 S.Ct. 269, 19 L.Ed.2d 305; Di Bella v. United States, 1962, 369 U.S. 121, 130, 82 S.Ct. 654, 7 L.Ed.2d 614; United States v. Burroughs, 1933, 289 U.S. 159, 161, 53 S.Ct. 574, 77 L.Ed. 1096; United States v. Sanges, 1892, 144 U.S. 310, 12 S.Ct. 609, 36 L.Ed. 445; United States v. Janitz, 3 Cir. 1947, 161 F.2d 19, 21; United States v. Pack, 3 Cir. 1957, 247 F.2d 168, 172; United States v. Koenig, 5 Cir. 1961, 290 F.2d 166.[28]

It is necessary to interrupt *Hamilton* at this point in order to discuss the next paragraph thereof. That paragraph reads,

> Thus in Will v. United States, 1967, 389 U.S. 90, 96, 88 S.Ct. 269, 274, 19 L.Ed.2d 305, the Supreme Court said that

[28] *Ibid.*

> ". . . 'in the federal jurisprudence, at least, appeals by the Government in criminal cases are something unusual, exceptional, not favored,' Carroll v. United States, 354 U.S. 394, 400, 77 S.Ct. 1332, 1336, 1 L.Ed.2d 1442, (1957), at least in part because they always threaten to offend the policies behind the double-jeopardy prohibition, cf. Fong Foo v. United States, 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962). Government appeal in the federal courts has thus been limited by Congress to narrow categories of orders terminating the prosecution, see 18 U.S.C. § 3731, and the Criminal Appeals Act is strictly construed against the Government's right of appeal . . ."

and in Di Bella v. United States, 1962, 369 U.S. 121, 130, 82 S.Ct. 654, 660, 7 L.Ed.2d 614, the Court stated:

> ". . . What disadvantage there be springs from the historic policy, over and above the constitutional protection against double jeopardy, that denies the Government the right of appeal in criminal cases save as expressly authorized by statute . . . No such expression appears in 28 U.S.C. § 1291, and the Government's only right to appeal, given by the Criminal Appeals Act of 1907 . . . now 18 U.S.C. § 3731, is confined to narrowly defined situations not relevant to our problem. Allowance of any further right must be sought from Congress and not this Court . . ."[29]

The Ninth Circuit commented on this paragraph as follows:

> Moreover, the existence of our jurisdiction under 28 U.S.C. § 1291 in this case generates no *double*

[29] *Ibid.*

> *jeopardy concerns* such as were present in *Virgin Islands v. Hamilton, supra* at 530-31. Our reversal rests not on the evidentiary insufficiency of the defendant-appellee's trial, but rather on an error made by the District Court of Guam while sitting as an appellate court to hear the defendant-appellee's appeal from his conviction. Following our reversal the defendant-appellee is entitled to have his appeal heard precisely as he would have had there been no error. To be so positioned does not amount to being subjected to jeopardy twice.[30]

"Double jeopardy concerns?" The holding in *Hamilton* is founded, not upon the Fifth Amendment, but upon "'*policies behind* the double-jeopardy prohibition,'" and then only "'*in part.*'"[31] This is made especially clear by the quotation to the effect that those policies are "'*over and above* the constitutional protection against double jeopardy.'"[32] The Third Circuit's holding, then, is at most based "'in part'" upon "'policies behind the double jeopardy prohibition,'"[33] policies which are "'over and above the constitutional protection against double jeopardy.'"[34] And what if the Third Circuit had actually entertained the *Hamilton* appeal and reversed the Virgin Islands district court? There would have been no more "double jeopardy concerns" than there are in the present case, which is to say, absolutely none at all.

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[30]Amended Opinion, printed as Appendix B hereto (emphasis added).

[31]*Id.* at 530 (emphasis added).

[32]*Id.* at 531 (emphasis added).

[33]*Id.* at 530.

[34]*Id.* at 531.

Hamilton concludes:

> In Umbriaco v. United States, 9 Cir. 1958, 258 F.2d 625, 626, the contention that an appeal by the prosecution in a criminal case is authorized by 28 U.S.C. § 1291 was expressly rejected. We are in accord with the views of the court of appeals in that case and hold that Section 1291 of title 28, U.S.C., does not give the Virgin Islands Government authority to appeal in criminal cases.
>
> The Government nonetheless argues that in Southerland v. St. Croix Taxicab Association, 3 Cir. 1963, 315 F.2d 364, 367, this court passed on the very question here involved when we stated that 28 U.S.C. § 1291 was not intended to limit our jurisdiction to appeals from those decisions only of the District Court of the Virgin Islands which it had entered in the exercise of its original jurisdiction but rather to "all final decisions of the court in every type of case" including those entered in appeals from the municipal court. We need only point out, however, that the question here is not whether this court may entertain an appeal from a final decision in which the district court had sat as an appellate court but whether the Government is specifically authorized to appeal in such a case if it is a criminal case. The *Southerland* case, which was a civil case, is not authority for the Government's proposition here.
>
> It has been expressly held in Illinois that the right of the prosecution to secure the review of the decision of an intermediate appellate court in a criminal case must rest upon statutory authority. People v. Ritchie, 1966, 36 Ill.2d 392, 222 N.E.2d 479. And see 24 C.J.S. Criminal Law § 1665. This ruling by the Illinois Supreme Court confirms our view that the right of the Government of the Virgin Islands to appeal from a final decision of the district court on appeal from the

> municipal court in a criminal case must likewise have express statutory authority. The Government, however, does not contend that it has any specific authorization to appeal in such a case, its sole reliance being upon 28 U.S.C. § 1291, which, as we have seen, does not provide the statutory authority which the decisions require. Our conclusion in this case is reinforced by the fact that under the local law of the Virgin Islands the defendant alone has the right in a criminal case to appeal to the district court from a judgment of the municipal court.[35]

The Ninth uses the last two quoted sentences in an attempt to distinguish *Hamilton* from the present case:

> [O]nce the authority to appeal is granted, section 1291 does given jurisdiction for appeals from a territorial district court appellate division reviewing an inferior court. *Southerland v. St. Croix Taxicab Association,* 315 F.2d 364 (3d Cir. 1963). *Accord, Sigal v. Three K's Ltd.,* 456 F.2d 1242 (3d Cir. 1972). Section 1238(5) of the Penal Code of Guam (supplanted by § 130.20(3) of the Criminal Procedure Code as of January 1, 1978) provides that authority. It states that the Government of Guam may take an appeal from "an order made after judgment, affecting the substantial rights of the government." Therefore this case is entirely unlike *Virgin Islands v. Hamilton, supra,* in which the court stated:
>
> > The Government, however, does not contend that it has any specific authorization to appeal in such a case, its sole reliance being upon 28 U.S.C. § 1291 . . . . Our conclusion in this case is reinforced by the fact that under the local law of the Virgin Islands the defendant alone has the right in a criminal case to appeal to the district court from a judgment of the municipal court. 4 V.I.C. § 33.
> >
> > 475 F.2d at 531.[36]

[35]Virgin Islands v. Hamilton, 475 F.2d 529, 531 (3rd Cir. 1973).

But *Southerland* and *Sigal* deal with appeals by private, non-governmental parties in civil, not criminal, cases.[37] *Southerland* is a 1963 decision. It held, "We see no possible basis for thus limiting the scope of section 1291."[38] *Hamilton* was decided in 1973. In *Hamilton* the Third Circuit *found* a basis for limiting the scope of § 1291. And *Sigal* made it clear that the holding in *Southerland* was *not* dependent upon local, Virgin Islands legislation. According to *Sigal,* "The soundness of this Court's reasoning in *Southerland* . . . is not affected by the 1965 amendments to 4 V.I.C. § 33."[39]

How can the Ninth Circuit suggest that local, territorial legislation provides it with jurisdiction to entertain the present case? In 1930 it said, "It is not claimed that the territorial legislation has any power to bind this court in the exercise of its appellate jurisdiction conferred upon it by the Congress of the United States."[40] More recently it held that "court of appeals jurisdiction over [Guam] district court decisions must, as appellee points out, be granted by Congress."[41] Olsen submits that these earlier

[36]Amended Opinion, printed as Appendix B hereto.

[37]"The *Southerland* case, *which was a civil case,* is not authority for the Government's proposition here." Virgin Islands v. Hamilton, 475 F.2d 529, 531 (3rd Cir. 1973) (emphasis added).

[38]Southerland v. St. Croix Taxicab Ass'n, 315 F.2d 364, 367 (3rd Cir. 1963) (Maris, J.).

[39]Sigal v. Three K's, Ltd., 456 F.2d 1242, 1243 (3rd Cir. 1972).

[40]Hauptman v. United States, 43 F.2d 86, 89 (9th Cir. 1930).

[41]Corn v. Guam Coral Co., 318 F.2d 622, 627 (9th Cir. 1963).

Ninth Circuit decisions are immeasurably sounder than the conflicting amended decision herein.

The Ninth Circuit observes "that the government of Guam may take an appeal from 'an order made after judgment, affecting the substantial rights of the government.' "[42] This is its reason for concluding that the present cause "is entirely unlike *Virgin Islands v. Hamilton.*"[43]

Hamilton states,

> The Government, however, does not contend that it has any specific authorization to appeal in such case, its sole reliance being upon 28 U.S.C. § 1291 . . . .[44]

Of course this is one of the reasons for the Third Circuit's holding, its holding that Congress failed to vest the Third Circuit with jurisdiction over appeals by the Virgin Islands government when it enacted 28 U.S.C. § 1291. But the Third Circuit states that there is yet another reason why it could not entertain the *Hamilton* appeal. That second reason is as follows:

> Our conclusion in this case is reinforced by the fact that under the local law of the Virgin Islands the defendant alone has the right in a criminal case to appeal to the district court from a judgment of the municipal court.[45]

That this is merely an additional and not necessary reason is demonstrated by the use of the word "reinforced." *Hamilton* gave two reasons for dismissal. The first was

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[42]Amended Opinion, printed as Appendix B hereto.
[43]*Ibid.*
[44]Virgin Islands v. Hamilton, 475 F.2d 529, 531 (3rd Cir. 1973).
[45]*Ibid.*

that the court of appeals did not have jurisdiction under 28 U.S.C. § 1291. The second reason was not (as interpreted by the Ninth Circuit) that the Virgin Islands legislature had never given the Third Circuit such jurisdiction. The second reason was that the Virgin Islands Legislature had never given the government of the Virgin Islands authority to prosecute such an appeal.

The Ninth Circuit, then, misreads *Hamilton. Hamilton* does not stand for the proposition that had the Virgin Islands legislature given the Virgin Islands government authority to take an appeal to the Third Circuit, the Third Circuit would thereby have had jurisdiction to entertain it. *Hamilton* does not even intimate that the Virgin Islands legislature is empowered to determine the appellate jurisdiction of the Congressionally created United States Court of Appeals for the Third Circuit. In *Hamilton* two reasons are given why the appeal had to be dismissed, *and each of those reasons is a wholly sufficient and independent basis for the dismissal.* In the present case only one of those reasons exists. That reason, however, is no less sufficient simply because it is not reinforced by a second.

A look at Guam's Organic Act shows Congress never intended to vest the Guam legislature with power to determine Ninth Circuit appellate jurisdiction. According to the Organic Act of Guam, the Guam legislature can determine the appellate jurisdiction of the district court:

> The District Court of Guam . . . shall have such appellate jurisdiction as the legislature may determine.[46]

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[46]48 U.S.C. § 1424(a).

This is the Guam legislature's only authority for determining appellate jurisdiction,[47] and *expressio unius est exclusio alterius.*

The Ninth Circuit Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court

The question whether the Ninth Circuit has jurisdiction to entertain appeals by the government of Guam from the District Court of Guam in criminal cases should be put to rest at this time. The amended opinion in the present cause obviously conflicts with the opinion of the Third Circuit in *Hamilton.* This is a case of first impression, and it is expected that the question will keep coming up until finally determined by this Court. (This writer has recently raised the question on behalf of a different client in another, unrelated, but presently pending Ninth Circuit case.)[48]

Until recently the government of Guam had not taken many criminal appeals, if any, but there is now legislation[49]

[47]*See* Guam v. Olsen, 431 U.S. 195 (1977).

[48]Guam v. Chargualaf, No. 79-1574 (9th Cir.).

[49]"Prior to trial, a party may apply for review of an adverse ruling made pursuant to subsections (a) through (c) of Section 65.15 by means of a petition for writ of mandate or prohibition unless the court, prior to the time review is sought, has dismissed the criminal action." GUAM CRIM. PRO. CODE § 65.17(a). "Any defense, objection or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following shall be raised prior to trial: (a) Defenses and objections based on defects in the institution of the prosecution; (b) Defenses and objections based on defects in the indictment, information or complaint (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); (c) Motions to suppress evidence; . . ." GUAM CRIM. PRO. CODE § 65.15.

which allows both the government of Guam and defendants to apply to the district court for interlocutory review of certain matters arising in superior court criminal cases. This has added substantially to the district court's appellate docket.[50] The government of Guam will naturally suffer a certain percentage of losses, and a significant number of such losses will be appealed to the Ninth Circuit.

Will the Ninth Circuit be able to entertain these appeals? It is certain that defendant-appellees will raise this question in each and every government of Guam appeal. They will be encouraged by the very existence of *Hamilton.* This Court will be petitioned for writs of certiorari.

Only by granting the present petition will the question be authoritatively determined and the government of Guam and defendant-appellees enabled to litigate their controversies in an environment of jurisdictional certainty.[51]

[50]This writer is advised by a deputy clerk that the number of criminal appeals taken from the superior court to the district court since January 1, 1978, is 62.

[51]Recent Guam cases wherein this Court has granted certiorari in order to engender jurisdictional certainty are Chase Manhattan Bank v. S. Acres Dev. Co., 434 U.S. 236 (1978), and, of course, Guam v. Olsen, 431 U.S. 195 (1977).

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the amended judgment and opinion of the Ninth Circuit.

Dated, Agana, Guam,
October 17, 1979.

Respectfully submitted,

HOWARD TRAPP
Attorney for Petitioner

(Appendices Follow)

Appendices

APPENDIX A

United States Court of Appeals
for the Ninth Circuit

The People of the Territory of Guam, Plaintiff-Appellant, vs. Edmund J. Olsen, Defendant-Appellee.	No. 79-1001

[Filed August 2, 1979]

OPINION

Appeal from the District Court of Guam,
Appellate Division

Before: ELY and SNEED, Circuit Judges, and
FITZGERALD*, District Judge

PER CURIAM:

The People of the Territory of Guam appeal from a decision of the District Court of Guam sitting as an appellate court, reversing a jury conviction in the Superior Court of Guam and remanding the case to the trial court with instructions to enter a judgment of acquittal. The district court reversed the conviction due to the failure of the trial court to provide a trial transcript with reasonable promptness. The district court opinion appears at 462 F. Supp. 608 (D. Guam 1978). We note jurisdiction under 28 U.S.C. § 1291 and reverse and remand to the district for it to consider defendant's appeal.

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*Honorable James M. Fitzgerald, District Judge for the District of Alaska, sitting by designation.

I. FACTS

This is an old case that, as a result of our action, is destined to live yet a while. It all began on September 11, 1975, when defendant was convicted of burglary in the second degree and other crimes in the Superior Court of Guam. Notice of appeal to the Federal District Court and to the Supreme Court of Guam was filed October 28, 1975. On March 9, 1976, the district court dismissed the appeal for lack of jurisdiction on the basis of *Agana Bay Development Co. (Hong Kong) Ltd. v. Supreme Court of Guam,* 529 F.2d 952 (9th Cir. 1976), which held that proper appeal from the Superior Court of Guam lay in the Supreme Court of Guam, not in federal district court. Defendant then appealed that dismissal and we reversed in *Territory of Guam v. Olsen,* 540 F.2d 1011 (9th Cir. 1976) (en banc), *aff'd,* 431 U.S. 195 (1977). The Supreme Court affirmed on May 23, 1977. Only at that time did it become clear where the defendant's appeal should be heard.

While this skirmishing took place, the trial court on March 22, 1976 granted defendant's motion to appeal in forma pauperis and to be provided with a transcript on appeal. The transcript had not been delivered by March 31, 1978, at which time defendant moved for reversal of his conviction on the grounds of undue delay in the preparation of his transcript. Defendant took no action to secure the transcript pursuant to the March 22, 1976 order while he pursued the appeal of the original district court dismissal. Indeed, he took no action even after May 1977 until his March 31, 1978 motion to reverse. Two days prior to the hearing on the motion, held May 26, 1978, the transcript finally was delivered. The district court did not reach the

merits of defendant's appeal when it issued its opinion reversing the conviction October 20, 1978.

II. DISCUSSION

The district court relied upon two District of Columbia Court of Appeals decisions in reaching its decision to reverse defendant's conviction: *Holmes v. United States,* 383 F.2d 925 (D.C. Cir. 1967); *Whitt v. United States,* 259 F.2d 158 (D.C. Cir. 1958), *cert. denied,* 359 U.S. 937 (1959). Neither of these cases reached this issue. Moreover, neither case intimated that a reversal could be ordered without a showing of prejudice. In fact, no previous case of which we are aware has applied the sanction here imposed by the district court.

In this case there is no showing on the record of prejudice to the defendant caused by the delay in the trial court's providing him a transcript. The district court's finding that the delay in this case was "inherently prejudicial" is not enough. We believe specific actual prejudice must be shown to have been caused by the delay. We hold, therefore, that the district court abused its discretion here by not requiring a showing of specific actual prejudice to the defendant from the delay in receiving the transcript.

A serious problem with respect to the preparation of trial transcripts in Guam exists. However, resort to the extreme sanction employed by the district court to solve this problem is unwarranted under the circumstances of this case. We do not by our decision foreclose the right of defendant to reinstate the district court reversal upon a showing on remand of specific actual prejudice. Nor do we reject the possibility that at some point a substantial delay

may of itself create sufficient prejudice to justify such action. Under the circumstances of this case, however, the district court abused its discretion in reversing appellant's conviction.

REVERSED and REMANDED.

APPENDIX B

United States Court of Appeals
for the Ninth Circuit

The People of the Territory of Guam,
Plaintiff-Appellant,

vs.

Edmund J. Olsen,
Defendant-Appellee.

No. 79-1001

[Filed September 26, 1979]

AMENDED OPINION

Appeal from the District Court of Guam,
Appellate Division

Before: ELY and SNEED, Circuit Judges, and
FITZGERALD*, District Judge

PER CURIAM:

The People of the Territory of Guam appeal from a decision of the District Court of Guam sitting as an appellate court, reversing a jury conviction in the Superior Court of Guam and remanding the case to the trial court with instructions to enter a judgment of acquittal. The district court reversed the conviction due to the failure of the trial court to provide a trial transcript with reasonable promptness. The district court opinion appears at 462 F. Supp. 608 (D. Guam 1978). We note jurisdiction under 28 U.S.C. § 1291 and reverse and remand to the district for it to consider defendant's appeal.

*Honorable James M. Fitzgerald, United States District Judge for the District of Alaska, sitting by designation.

I. FACTS

This is an old case that, as a result of our action, is destined to live yet a while. It all began on September 11, 1975, when defendant was convicted of burglary in the second degree and other crimes in the Superior Court of Guam. Notice of appeal to the federal district court and to the Supreme Court of Guam was filed October 28, 1975. On March 9, 1976, the district court dismissed the appeal for lack of jurisdiction on the basis of *Agana Bay Development Co. (Hong Kong) Ltd. v. Supreme Court of Guam,* 529 F.2d 952 (9th Cir. 1976), which held that proper appeal from the Superior Court of Guam lay in the Supreme Court of Guam, not in Federal District Court. Defendant then appealed that dismissal and we reversed in *Territory of Guam v. Olsen,* 540 F.2d 1011 (9th Cir. 1976) (en banc), *aff'd,* 431 U.S. 195 (1977). The Supreme Court affirmed on May 23, 1977. Only at that time did it become clear where the defendant's appeal should be heard.

While this skirmishing took place, the trial court on March 22, 1976 granted defendant's motion to appeal in forma pauperis and to be provided with a transcript on appeal. The transcript had not been delivered by March 31, 1978, at which time defendant moved for reversal of his conviction on the grounds of undue delay in the preparation of his transcript. Defendant took no action to secure the transcript pursuant to the March 22, 1976 order while he pursued the appeal of the original district court dismissal. Indeed, he took no action even after May 1977 until his March 31, 1978 motion to reverse. Two days prior to the hearing on the motion, held May 26, 1978, the transcript finally was delivered. The district court did not reach the

merits of defendant's appeal when it issued its opinion reversing the conviction October 20, 1978.

II. JURISDICTION

Appellant [sic] first argues that this court lacks jurisdiction to entertain the Government of Guam's appeal in this case. He properly cites *Virgin Islands v. Hamilton,* 475 F.2d 529 (3d Cir. 1973), for the proposition that 28 U.S.C. § 1291 does not empower the government to appeal. However, once the authority to appeal is granted, section 1291 does give jurisdiction for appeals from a territorial district court appellate decision reviewing an inferior court. *Southerland v. St. Croix Taxicab Association,* 315 F.2d 364 (3d Cir. 1963). *Accord, Sigal v. Three K's Ltd.,* 456 F.2d 1242 (3d Cir. 1972). Section 1238(5) of the Penal Code of Guam (supplanted by § 130.20(3) of the Criminal Procedure Code as of January 1, 1978) provides that authority. It states that the Government of Guam may take an appeal from "an order made after judgment, affecting the substantial rights of the government." Therefore this case is entirely unlike *Virgin Islands v. Hamilton, supra,* in which the court stated:

> The Government, however, does not contend that it has any specific authorization to appeal in such a case, its sole reliance being upon 28 U.S.C. § 1291 . . . . Our conclusion in this case is reinforced by the fact that under the local law of the Virgin Islands the defendant alone has the right in a criminal case to appeal to the district court from a judgment of the municipal court. 4 V.I.C. § 33.

475 F.2d at 531.

Moreover, the existence of our jurisdiction under 28 U.S.C. § 1921 in this case generates no double jeopardy concerns such as were present in *Virgin Islands v. Hamilton, supra* at 530-31. Our reversal rests not on the evidentiary insufficiency of the defendant-appellee's trial, but rather on an error made by the District Court of Guam while sitting as an appellate court to hear the defendant-appellee's appeal from his conviction. Following our reversal the defendant-appellee is entitled to have his appeal heard precisely as he would have had there been no error. To be so positioned does not amount to being subjected to jeopardy twice. *See, Burks v. United States*, 437 U.S. 1, 15, 98 S.Ct. 2141, 2149 (1978).

III. THE MERITS

The district court relied upon two District of Columbia Court of Appeals decisions in reaching its decision to reverse defendant's conviction: *Holmes v. United States,* 383 F.2d 925 (D.C. Cir. 1967); *Whitt v. United States,* 259 F.2d 158 (D.C. Cir. 1958), *cert. denied,* 359 U.S. 937 (1959). Neither of these cases reached this issue. Moreover, neither case intimated that a reversal could be ordered without a showing of prejudice. In fact, no previous case of which we are aware has applied the sanction here imposed by the district court.

In this case there is no showing on the record of prejudice to the defendant caused by the delay in the trial court's providing him a transcript. The district court's finding that the delay in this case was "inherently prejudicial" is not enough. We believe specific actual prejudice must be shown to have been caused by the delay. We hold, therefore, that

the district court abused its discretion here by not requiring a showing of specific actual prejudice to the defendant from the delay in receiving the transcript.

A serious problem with respect to the preparation of trial transcripts in Guam exists. However, resort to the extreme sanction employed by the district court to solve this problem is unwarranted under the circumstances of this case. We do not by our decision foreclose the right of defendant to reinstate the district court reversal upon a showing on remand of specific actual prejudice. Nor do we reject the possibility that at some point a substantial delay may of itself create sufficient prejudice to justify such action. Under the circumstances of this case, however, the district court abused its discretion in reversing appellant's conviction.

REVERSED and REMANDED.

APPENDIX C

District Court of Guam
Appellate Division

The People of the Territory of Guam, Plaintiff-Appellee, vs. Edmund J. Olsen, Defendant-Appellant.	Undocketed Criminal Case No. 84F-75

[Filed October 20, 1978]

OPINION

Before: DUENAS and HILL, District Judges, and BURNETT, Designated Judge.

HILL, District Judge:

In this case we consider the effect of a very long delay in the preparation of a reporter's transcript of the trial, upon an appeal of a criminal conviction in the Superior Court of Guam.

Defendant Olsen was convicted in that court on September 11, 1975, of burglary in the second degree (2 counts), assault with a deadly weapon (1 count), and receiving stolen property (1 count). Sentence was pronounced on October 28, 1975. Concurrent sentences were imposed as follows: for each of the burglaries, 8 years; for the assault, 10 years; and for receiving stolen property, 2 years. A notice of appeal was filed the same day.

By order dated March 22, 1976, the Superior Court of Guam granted Olsen leave to appeal in forma pauperis and ordered that a transcript be provided to him at public expense. No explanation appears from the file for the delay of several months between the filing of the notice of appeal and the issuance of the order for the preparation of a transcript on March 22, 1976.

Olsen was at large on bail at the time of his trial, although he had been incarcerated for a period of about a month after his arrest before he made bail. That period will be credited to his sentence in this case. Upon his conviction, Olsen's bail was set aside and he was again remanded to custody. He remained in custody serving the above mentioned sentences from September 11, 1975, until August 27, 1976, when he was again admitted to bail. He has remained at liberty on said bail until now. He has thus already served more than 12½ months in custody on the sentences imposed in the instant case.[1]

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[1]Olsen became the victim of the uncertainty prevailing in Guam in 1975 as to whether criminal appeals from the Superior Court of Guam were properly entertained by the District Court of Guam, Appellate Division (this court) or by the Supreme Court of Guam. Olsen's counsel fortunately filed his notice of appeal in both courts. The District Court of Guam (with a single judge acting) dismissed the appeal on the ground that the Supreme Court of Guam was the only one with proper appellate jurisdiction. The dismissal was based on an opinion of a panel of the Ninth Circuit so holding, *Agana Bay Development Co. (Hong Kong) Ltd. v. Supreme Court of Guam*, 529 F.2d 952 (9th Cir. 1976) (2-1 decision). Olsen's counsel secured an en banc hearing by the Circuit and the panel's decision was reversed. The Circuit held that this court is the only one having jurisdiction to hear criminal appeals from the Superior Court of Guam. *People of Territory of Guam v. Olsen*, 540 F.2d 1011 (9th Cir. 1976) (en banc). That decision was affirmed by the U.S. Supreme Court, *sub nom Territory of Guam v. Olsen*, 431 U.S. 195 (1977).

This history is recited not because be believe it to be relevant but at a matter of interest only. The order of the Superior Court of Guam of March 22, 1976, requiring the production of a trial transcript remained in effect and unchanged throughout the various jurisdictional appeals mentioned above. The jurisdictional uncertainty is not claimed, either by the Attorney General or the court reporter, to have played any role in delaying the preparation of Olsen's trial transcript.

On March 31, 1978, more than two years after the order for the production of the transcript was issued, Olsen's counsel filed in this court a motion that this court reverse the judgment of conviction with instructions to the Superior Court to enter a judgment of acquittal because of the failure to provide the trial transcript with reasonable promptness. That motion is the subject of the instant proceeding. The file reveals no other effort by Olsen's counsel in the trial court, to obtain the transcript following his securing the order of March 22, 1976, for its production. A motion in an appellate court of the type employed here, which seeks a reversal of the conviction for trial court omissions or delays during the appeal period, is not expressly provided for in either the Federal Rules of Criminal Procedure or the Federal Rules of Appellate Procedure. However, there is some precedent for such a motion. A motion for reversal, made apparently in the first instance in the appellate court and based on delay in delivery of the trial transcript, was considered by the D.C. Circuit in *Holmes v. United States*, 383 F.2d 925 (D.C. Cir. 1967).[2]

The Attorney General of Guam has raised no question in his papers or at the argument, as to the propriety of

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[2]The opinion in *Holmes* unfortunately did not describe the type of procedure used in that case; but the procedure involved in *Holmes* was later described in a subsequent opinion written by the same judge. *Blunt v. United States*, 404 F.2d 1283, 1290 (D.C. Cir. 1968). He characterized it as a motion made in the appellate court and it is obvious that the motion was one for reversal of the conviction.

our entertaining the instant motion or as to Olsen's failure to seek relief from the trial court. The Attorney General's papers assume that we have jurisdiction to entertain the motion. We will likewise assume that jurisdiction exists but are careful to point out that that question has not been briefed before us.[3]

The only explanation or justification for the delay of more than two years in the preparation of the instant transcript, is contained in an affidavit of Lolita C. Toves, the Court Reporter at the trial, filed on April 13, 1978. Ms. Toves first states therein that as of April 13, 1978, she is "at present" engaged in the preparation of the transcript. Parenthetically, one wonders if there is not some cause-and-effect relationship between the filing of the instant motion on March 31, 1978, and the revelation on April 13, 1978, after more than two long years, that the transcript was finally being prepared. The affidavit then goes on to state that the delay in providing the instant transcript was caused by the fact that Ms. Toves had been serving continuously in the court of Judge Raker and that his calendars were heavy, and, moreover, the lack of reporters in the Superior Court of Guam had resulted in her having to serve as reporter for other judges. She goes on to state that the delay was further caused by her "transcription of three murder cases demanding priority". Neither Ms. Toves

[3]A strong argument could be made that one seeking the ultimate sanction of reversal of a conviction for failure of the trial court's reporter to provide a transcript within a reasonable time, should be required to initiate the proceeding in the trial court. In the federal practice, when seeking reversal of a conviction for failure to observe constitutional standards during the trial, one must start in the trial court by a motion under 28 U.S.C. § 2255 which reaches the appellate court only after the trial court has acted.

nor the Attorney General cite any statute, court rule or court order giving priority to any other criminal appeal over the instant one. Nor do they claim that any of the three murder cases involved an order for a transcript which antedated the order of March 22, 1976, for the production of Olsen's transcript.

The instant motion, as stated, was filed in March of 1978. Because of the difficulty of convening our three-judge court, the matter was not set for hearing until May 26, 1978. *Mirabile dictu!* On May 24, 1978, two days before our hearing, the instant transcript was finished, filed and delivered to defense counsel. Again, parenthetically, one wonders when the transcript would have been completed in the absence of this motion and its being calendared for hearing before us.

We must and do conclude that the preparation of the instant transcript has been unreasonably delayed and no good cause or excuse for the delay has been shown.

We come now to a discussion of the law. Unfortunately, there are very few reported cases that deal with the subject of delay in the preparation of a trial transcript and we have found none which orders a reversal on that account. But the importance of prompt preparation of a trial transcript as an absolutely necessary part of the right of appeal has been discussed by the Supreme Court and the Circuit Courts.

In *Hardy v. United States*, 375 U.S. 277, 84 S.Ct. 424 (1964), Mr. Justice Douglas said in a concurring opinion:

> "As any effective appellate advocate will attest, the most basic and fundamental tool of his profession is

the complete trial transcript, through which his trained fingers may leaf and his trained eye may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law. Anything short of a complete transcript is incompatible with effective appellate advocacy." 375 U.S. at 388.

In *Holmes v. United States, supra,* the D. C. Circuit said:

> "We think it clear, and the Government does not argue otherwise, that appellant had a statutory right to a trial transcript, 28 U.S.C. § 1915, and that such right necessarily included reasonably prompt receipt of the transcript in order that prosecution of the appeal for which it is furnished would not be thwarted . . . . Delay in the preparation of transcripts is a problem we face with disturbing frequency. We know from our discussions with district judges that there is a serious shortage of reporters and that they now labor under unusually heavy workloads . . . .The record does not show why this particular transcript was delayed, nor do we think it necessary to search for the cause. More than likely, delay in preparation of transcripts is an amalgam of many factors. But where we deal with a statutory right, *even the most plausible of reasons cannot serve to excuse outright denial of that right.*" Emphasis supplied.

See to the same effect, *MacCollom v. United States*, 511 F.2d 116 (9th Cir. 1964).

Neither in his brief nor in his oral argument does the Attorney General take express issue with Olsen's claim that there was an unreasonable delay in the preparation of the trial transcript in this case. Nor does the Attorney

General make any claim that any part of that delay is attributable to the Defendant or his counsel. The Attorney General resists the motion and the relief sought on only two grounds:

1. The Defendant or his counsel had a duty to take affirmative action of some sort, such as the filing of a mandamus petition, to compel the earler production of the transcript if he was dissatisfied with the delay, and, having failed to do anything, cannot seek reversal of the conviction for that reason.

2. The Defendant must show substantial prejudice from the delay and none can be shown in this case because the Defendant has remained at large on bail for most of the period after March 22, 1976, when the transcript was ordered.

We believe that neither contention has merit.

The claim that Defendant or his counsel should have taken some earlier affirmative action on their own before making this motion, is not persuasive. Once an indigent defendant has obtained a court order for the production of the trial transcript, he has, in our view, done everything he can or should be expected to do in this regard and he has a right to rely on the prompt production of the transcript without his being required to do anything more.[4]

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[4]The Attorney General may not be powerless to compel the reporter to produce the transcript when it appears that the delay may be reaching unreasonable proportions. *Cf. United States v. Metzger,* 133 F.2d 82 (C.C.A. 9th 1943), in which a writ of mandate was granted directing the court reporter to produce a transcript without the additional compensation which the reporter claimed to be due. While the Attorney General may have this possible remedy for a reporter's delay and employ it at his dis-

On the issue of prejudice, the Attorney General discusses some cases decided by the District of Columbia Circuit. That Circuit has produced the three major appellate cases in the federal jurisprudence which discuss delay in the production of criminal trial transcripts.[5] The three cases merit some detailed analysis.

In the first case, *Holmes v. United States, supra,* the Defendant, appearing in forma pauperis with appointed counsel, was convicted of destruction of private property, a misdemeanor. Leave to appeal in forma pauperis was granted on March 7, 1966, at which time a transcript was ordered to be prepared at government expense. The trial judge had imposed a six-month sentence and the Defendant remained in jail on that sentence because he could not afford a bail bond. The transcript was delivered July 8, 1966, four months and one day after the order to produce it. On July 11, 1966, appellant was released from jail without condition, having served his entire sentence. The matter was heard by the appellate court on September 16, 1966. The opinion is not clear as to whether alleged errors in the trial were ever argued before the appellate court. The appellate court opinion is confined to the decision of a motion for reversal made by defense counsel apparently based solely on the delay in furnishing the transcript.

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cretion, we feel that there is no basis for holding that defense counsel must employ the same remedy as a prerequisite to obtaining relief.

[5]The only other federal appellate case discussing delay in the preparation of a trial transcript is *United States v. Amos,* 566 F.2d 899 (4th Cir. 1977). That perfunctory *per curiam* opinion states no facts on this issue. It merely observes that the Defendant, who claimed that an unspecified delay in transcript preparation had violated due process, had shown no prejudice as a result of the unspecified delay.

Using the language quoted above, the D. C. Circuit emphasized the seriousness of any lengthy delay of the production of a trial transcript. But the court denied the motion for reversal on the ground that the matter was moot. Nothing is said in the opinion about prejudice or the need to show prejudice to overcome an unreasonable delay in the production of a transcript. Instead, the D. C. Circuit observed that when a Defendant has served his entire sentence with no further hold on him, his appeal (and, presumptively, his claim of being delayed in presenting his appeal) is "not justiciable" unless he is able to show some "collateral disadvantage which [he] might reasonably be expected to incur by virtue of the conviction." 383 F.2d at 927. The court found that no collateral disadvantage was shown in the case because Defendant Holmes had suffered 14 valid misdemeanor convictions before the instant one, including one previous conviction of the identical offense.

Holmes, therefore, is a holding of mootness and is no authority on the question of prejudice.

The next case in this line is *Blunt v. United States*, 404 F.2d 1283 (D.C.Cir. 1968). In *Blunt,* Defendant was in forma pauperis appearing through appointed counsel during both the trial and the appeal. He was convicted on all 8 counts of an indictment charging robbery, fraud by wire and forgery. He was sentenced to concurrent sentences, the longest of which was an indeterminate sentence of 5 to 15 years. On appeal, his counsel argued many different grounds of alleged error in the trial. Also included in the appeal was the claim that the conviction should be reversed because of the long delay in preparing the trial transcript. The facts were that defense counsel did not

receive the first volume of the transcript until about 6 months after the appeal was docketed and the last of the 3 volumes was not delivered until 10 months after the docketing because the reporter had temporarily mislaid her notes. The Defendant was apparently in jail throughout the post-conviction period. The Court of Appeals first, point by point, rejected every substantive ground of appeal. It then rejected the request for reversal based on delay in the preparation of the transcript on the ground that, since the conviction was otherwise valid and the Defendant had not yet served his minimum sentence, the Defendant had "suffered no unnecessary detention or collateral disadvantage", 404 F.2d at 1290. The court went on to say that the delay had not prejudiced the Defendant in presenting his arguments on appeal because he had had his appeal and had argued all of his contentions of error. Thus, the Court found that the Defendant was not in any way prejudiced by the delay.

The *Blunt* opinion can be viewed in various ways. It can be read as a holding that no reversal will be granted because of delay in the preparation of a trial transcript, no matter how long the delay has been, unless the Defendant can show some type of prejudice resulting from the delay. If so read, the essential holding is that a delay of 10 months in the preparation of a transcript followed by an immediate appeal thereafter in which no error was discovered in the conviction, is not a sufficient showing of prejudice, especially since the Defendant whose conviction was error-free had not yet served the minimum term at the time the appeal was argued and decided. *Blunt* can also be viewed as a holding that a 10 month delay is not an

unreasonable delay under the specific facts of that case. However the *Blunt* opinion is read, the case is obviously distinguishable on its facts from the instant case.

The third D. C. Circuit opinion in order is *Kinard v. United States*, 418 F.2d 453 (D.C.Cir. 1969). Kinard, apparently a young man, was convicted of assault with a deadly weapon. He too was in forma pauperis at both the trial and on appeal. He was sentenced to an indeterminate jail term of from one to three years. In the appeal, counsel argued a number of alleged errors at the trial. There was also urged on appeal the question of delay in obtaining the trial transcript. The transcript was ordered to be produced on December 21, 1967, and it was delivered on May 23, 1968. The delay was thus five months and two days. The appeal was heard some months after the transcript was delivered. The court found no substantive errors in the trial and declined to reverse because of the transcript delay despite the fact that Defendant had been in jail since the trial. As the only reason advanced for rejecting the delay claim, the court merely said that defense counsel had advised the appellate court in argument that no effort was made to release the Defendant pending appeal because his family was happy with the vocational training being given the Defendant at the reformatory and believed that the training might well lead to a brighter future for the Defendant. The result in *Kinard* can only be explained on the ground that a five-month delay is insubstantial and not unreasonable. The opinion does not mention the term "prejudice" and *Kinard* cannot be considered as any authority on the issue of whether a showing of prejudice is required.

In the instant case, the Attorney General points out that Olsen has been released on bail for months and is still out on bail. Ergo, says the Attorney General, he can show no prejudice from the delay. We do not agree that a release on bail of itself negates the existence of any prejudice. It is simply not true that because a convicted Defendant is out on bail, he cannot be harmed by long delays in the prosecution of his appeal. The Defendant remains subject to a lengthy jail sentence and he is entitled to know promptly whether he will have to serve that sentence or not. He is not required to spend years in limbo unable to plan his life or make any commitment for future activity. Moreover, in the instant case, it cannot be overlooked that Olsen spent from September 11, 1975, the date of conviction, to August 27, 1976, in jail before he obtained bail on appeal. If this transcript had been promptly produced when ordered and if reversible error had occurred in the trial, at least some of those months in jail would not have been served. Under all of the facts of this case, we are of the opinion that a delay of such proportions as has been shown here is so unreasonable and so destructive of the right to a prompt appeal as to render the conviction reversible as a matter of law with no showing of prejudice being necessary. But if we are in error in that holding and a showing of prejudice is deemed to be a *sine qua non*, we believe a sufficient showing of prejudice appears on the face of this record.

Of late, there has been much emphasis in the press and in the halls of Congress on the right to a speedy trial. It has been recognized that the concept of speedy trial involves a vindication of both the rights of the Defendant

and the rights of the public. The Defendant is entitled to a prompt determination in the trial court of the charges against him. And the public is entitled to the prompt trial and conviction of persons guilty of crime. The same corollary rights are involved in the concept of speedy termination of appeals.[6] They aid innocent Defendants who turn out to be not guilty of the crimes charged and they aid the public by securing the prompt incarceration of those found guilty of crime. If a speedy termination of appeals is necessary for the vindication of these public policies, it goes without saying that to require prompt production of the trial transcript serves both policies. There can be no commencement of the appeal process, and thus no speedy termination of the appeal, until the transcript exists. No administrative or budgetary problem in connection with the employment of court reporters can be allowed to take precedence over the twin public interests at stake in this case. We must opt for prompt appeals and we must take the step, unwelcome as it is, of turning loose a presumptively guilty Defendant, in order to vindicate the public policies involved.[7]

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[6]*Cf. Way v. Crouse,* 421 F.2d 145, 146 (10th Cir. 1970).

[7]The result we have reached in this case cannot be reconciled with an opinion of the Supreme Court of Minnesota in *State ex rel Mastrian v. Tahash,* 277 Minn. 309, 152 N.W.2d 786 (1967). In that case, the Minnesota Supreme Court denied a habeas petition based on delay in producing the trial transcript, which petition was heard before any appellate court had reviewed the conviction. The petitioner, an indigent, had been convicted in the trial court of murder in April of 1964. The trial transcript was not completed until May 1967. The petitioner had apparently spent the entire period of over three years in prison. By the time the Minnesota Supreme Court decided to deny the habeas petition, the transcript had finally been prepared and an explanation of the delay had been offered. A major part of the delay was due to the fact that petitioner had moved the trial court for a change

The prospect of freeing a Defendant adjudged guilty of serious crimes concerns us greatly.[8] But in our view, there is no other reasonably appropriate sanction for the kind of delay that has been experienced in this case. We cannot hold the reporter in contempt; we cannot mandate the Superior Court to hire more reporters; we cannot mandate the Legislature to appropriate more money for that purpose.

In ordering this Defendant's release, we wish to make two things abundantly clear concerning the rule of law which we now establish. First, we state explicitly and categorically that our decision shall have no retroactive application and that no motion for reversal or application for other relief on the ground of delayed transcript production shall be entertained by this Court or the Superior Court in closed cases. Relief will also be denied in cases where an appeal has already been heard but not decided. In other words, relief can be granted only in appeals to be heard after the date of the publication of this decision.

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of venue for the trial and the motion was granted. After his conviction, a dispute erupted between the two counties concerned as to which county would pay for the trial transcript. A portion of the delay was due, as in the instant case, to heavy court calendars necessitating overtime for the reporter. The delay was also in part due to the great length of the transcript (over 6,000 pages). The opinion emphasizes that none of the delay was the result of any "callous indifference or deliberate purpose either to delay or deny [the] appeal . . . ." 152 N.W.2d at 786. The opinion also seems to impose a burden on defense counsel to move for production of a delayed transcript before seeking a reversal on that ground. The Minnesota court also refused to recognize the existence of any right of speedy appeal. We believe that *Mastrian* was simply incorrectly decided.

[8]We apparently are the first appellate court which has ordered a reversal for delay in providing a trial transcript. But this result was clearly foreshadowed and envisioned in at least two prior Circuit opinions. *Holmes v. United States, supra; Whitt v. United States,* 259 F.2d 158 (D.C.Cir. 1958).

Second, we hold that this Court will not henceforth entertain any applications for relief based on delay in the production of the transcript unless there has previously been made an application for relief in the trial court. We do not here define the form of such application. It may perhaps be by way of habeas corpus petition, motion under 28 U.S.C. § 2255 or in some other form. But we believe it a sound principle of judicial administration that shortcomings and delays in the performance of duty by trial court employees should be first called to the attention of the trial court. We expect the trial court to adjudicate those applications promptly so that, when necessary, this Court may hear an appeal from its decision without further undue delay.

The conviction is reversed. The cause is remanded to the trial court with instructions to enter a judgment of acquittal.

/s/ CRISTOBAL C. DUENAS

Cristobal C. Duenas

/s/ IRVING HILL

Irving Hill

/s/ HAROLD W. BURNETT

Harold W. Burnett